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## The Offside Goals Rule and English Equity

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### Introduction

To lawyers outside of Scotland, the “offside goals” rule in Scottish property law sounds fascinating.<sup>1</sup> Some attention can be attracted whenever the name is mentioned, even from those who have little interest in property or Scots law. For Scots property lawyers, however, in the light of a couple of controversial cases in the Outer House<sup>2</sup>, the “offside goals” rule is troublesome and far less exciting than the name suggests.

A double sale is the most straightforward case where the rule can operate. The seller concludes contract to sell his house with two purchasers one after the other. If the second purchaser acquires the real right through land registration before the first purchaser, while being aware of the first purchaser’s personal right all the time, his title is voidable at the instance of the first purchaser. Lord Justice-Clerk Thomson christened and immortalised this doctrine by comparing the second purchaser’s title to offside goals in football.<sup>3</sup>

From the outset this rule serves important purposes, such as the prevention of fraud and the penalisation of bad faith. However, analogy of association football did not lay down the details that parties need in order to avoid being “offside”. The more cases and scholarly studies there are, the more problematic this rule seems to be. It is difficult to identify its origin, to ascertain its compatibility with other property law principles, or to demarcate its boundary of application.<sup>4</sup>

Yet the more uncertain this rule is, the more weight the court seems willing to afford it. In *Burnett’s Tr v Grainger*, arguably the most important Scots property law case of the

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<sup>1</sup> The term has received specific mention by commentators even where its substance has little to do with the context, see for example J Farrand & A Clark, “Observations” (2012) *Emment and Farrand on Title Bulletin* 1.

<sup>2</sup> *Alex Brewster & Sons v Caughey* (OH, unreported, noted by 2002 GWD 15-506); *Gibson v Royal Bank of Scotland* [2009] CSOH 14.

<sup>3</sup> *Rodger (Builders) Ltd v Fawdry* 1950 SC 483, 501. As pointed out by GL Gretton and AJM Steven, *Property, Trusts and Succession* (Tottel Publishing, 2009), [4.45], such analogy may be misleading because offside goals in football are void, not voidable.

<sup>4</sup> For a detailed and definitive explanation of the rule, albeit before most of the recent cases and studies, see KGC Reid, *The Law of Property in Scotland* (1996), para 695-700.

past decade, Lord Rodger started his speech adopting the offside goals rule as the approach which could have avoided any unfairness, before painstakingly explaining why the rule was unfortunately not applicable in that case. The result was that his lordship had to uphold the “correct” decision by the Inner House, despite the fact that “it shocks”.<sup>5</sup> In *Gibson v Royal Bank of Scotland*, Lord Emslie refused to prescribe any rigid confinement on this “equitable exception”.<sup>6</sup> The situation is understandably worrying for Scots law. Effectively there is now something in the shape of an essential rule or exception of fairness and equity, but the court is not going to clarify as to when it is definitely engaged or how far its influence will go.

In the report on land registration, the Scottish Law Commission included its thoughts on the possible abolition of the offside goals rule.<sup>7</sup> Although it was too late to fully consider the issue properly before the production of the report, the overwhelming opinions against the rule amongst academics and practitioners, such as Professors Reid and Rennie, were evident from the paragraphs. Given this was not a formal recommendation from the Scottish Law Commission, however, it may be many years before there is any statutory intervention in this regard.

In the meantime, Scots law is left with this puzzle, wondering how this rule attained its status and influence while remaining uncertain itself in the area of conveyancing and property law “where certainty has a particularly high value”.<sup>8</sup> What further controversies and difficulties might emerge from litigations before the rule is abolished, if it is to be abolished? Since all searches for a theoretical explanation of the rule have seen little success so far, it is unsurprising that academics and lawyers are always on the back foot, unsure about what to expect next from the court which seems more than happy to have a flexible “equitable exception” in its arsenal.

This paper suggests that much of the current difficulties and controversies surrounding the offside goals rule in Scots property law can be readily explained by looking to the English jurisdiction of Equity. Consciously or not, Scots law has somehow allowed an idea almost identical to the classic English doctrine of notice into its property law system completely different from the English counterpart. Furthermore, due to the fact that this rule was never satisfactorily explained, its development was severely limited because of the lack of theoretical guidance. Consequently the rule is left in a status akin to its English brethren in the early 20<sup>th</sup> century, prior to the land registration era and the legislative overhaul of property law in 1925. It is further submitted that unless the rule is abolished, severely pruned or theoretically clarified, it will continue to create more problems in Scots property law. Based on the experience of English law, it may be possible to gauge where and why such problems will arise.

## Scottish, South African or English?

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<sup>5</sup> [2004] UKHL 8 [67].

<sup>6</sup> [2009] CSOH 14 [49].

<sup>7</sup> Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222, February 2010) [14.61]-[14.65].

<sup>8</sup> *Ibid*, [14.61].

It is said that the offside goals rule dates from the 1580s<sup>9</sup>, not only many centuries before the advent of modern association football, but importantly before the union between Scotland and England. It is most unlikely Scots law at the inception of this rule would have borrowed any idea from its southern neighbour, due to the vast differences between the legal systems.

Interestingly however, Anderson's careful analysis of leading Scottish institutional writings, starting from Stair in the early 17<sup>th</sup> century,<sup>10</sup> revealed very little support for the existence or operation of such a rule. He concluded that the rule was perhaps not well known before its association with football in 1950.<sup>11</sup>

With the scarcity of Scottish materials on this topic, Wortley turned to South African law and literature, and in particular the work of Professor McKerron in the 1930s.<sup>12</sup> Scotland and South Africa share a Roman-Dutch Law heritage and the status of being a mixed legal system, with many comparative studies in property law pointing to significant similarities. Similar to Scots law, however, South African sources are equivocal and not as clear as was suggested, according to Wortley.<sup>13</sup>

There have been a number of instances where Equity in English law and its doctrine of notice were mentioned in this context but most authors pointed to the differences rather than resemblances. In his examination of constructive trusts, Professor Gretton observed the "parallel" of offside goals rule and concluded that Scots law, unlike its English counterpart, never imposed any constructive trust on any person in this context.<sup>14</sup> Wortley noted McKerron's view that the English doctrine of notice did not form the basis of the South African doctrine, despite his prevalent reputation as an angliciser.<sup>15</sup> Professor Rennie hinted on the connection with English Equity in this context.<sup>16</sup> Anderson briefly examined English law in his criticism of *Alex Brewster* before dismissing the comparison, as English law would have come to a different conclusion in his view.<sup>17</sup> In an earlier discussion paper, the Scottish Law Commission viewed the "doctrine of constructive notice" as narrow in Scotland, and therefore different to the feared expansive doctrine in Commonwealth jurisdictions.<sup>18</sup> Rather than creating an unfamiliar concept, this term of "doctrine of constructive notice" was indeed later clarified as a reference to the "offside goals rule", alongside another emphasis of the difference of the Scottish position.<sup>19</sup>

The reluctance to associate with English law is understandable. The two systems of property law in Scotland and England are completely different. Nevertheless, with great trepidation, it is submitted that if English law offers the most logical and comprehensive explanation to the variety of Scottish problems and uncertainties in this area, such an

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<sup>9</sup> R Rennie, 'Land Registration and the Decline of Property Law' (2010) Edin LR 62, 74.

<sup>10</sup> Stair, *The Institutions of the Law of Scotland*, I.xiv.5.

<sup>11</sup> RG Anderson, "'Offside Goals' before *Rodger Builders*' (2005) Jur Rev 277, 292.

<sup>12</sup> S Wortley, "Double Sales and the Offside Trap" (2002) Jur Rev 291, 300.

<sup>13</sup> Wortley (n 12) 306.

<sup>14</sup> G Gretton, "Constructive Trusts: Part 1", (1997) Edin LR 281, 301.

<sup>15</sup> Wortley (n 12) 302, fn 63; Cf Anderson (n 11) 278, fn 7.

<sup>16</sup> R Rennie, 'Marching towards equity – blindfolded' (2009) SLT 187, 192.

<sup>17</sup> Anderson (n 11) 289. This seems to be an unfortunate misreading of English law, to be discussed below.

<sup>18</sup> Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (SLC DP 125, February 2004), [6.14].

<sup>19</sup> SLC, *Report on Land Registration*, [20.14].

association is invaluable to the continuing effort to understand and to possibly reform the law. While Scots law in this context might have started without English influence in the 16<sup>th</sup> century, the weight of evidence in modern times points to similarities in the systems that are too great to be meaningless coincidences. This paper will examine these in turn. Whatever the history or true origin of the offside goals rule may be, as things stand, the law applied by the Scottish court resembles English law more than any other comparative candidate, or indeed any other property law principle in Scotland. This unspoken “English-ness” is arguably also the cause of the many problems and difficulties confronting the rule.

### Starting point: *Rodger Builders*

*Rodger (Builders) Ltd v Fawdry*<sup>20</sup>, a rather typical double sale of the same land due to the delay of payment by the first purchaser, was not the starting point of the doctrine. But it did more than just giving the doctrine a name, which made it easy to remember and ripe for discussion. The Lord Ordinary at first instance based the decision on three cases between 1828 and 1876.<sup>21</sup> The only substantive ground argued on appeal to the Inner House was the interpretation of these three cases. The appellant argued that these cases required “an element of conscious dishonesty” for any party to be penalised for having knowledge of another party’s prior personal right. On appeal, Lord Jamieson rejected this argument, concluding that having knowledge of the full terms of the prior contract was more than enough to render the second purchaser *mala fide* in law, despite a credible claim that the person trusted the seller’s assurance that the contract with the first purchaser was already rescinded due to non-payment of purchase price. The case thus finished the foundation work of the modern law by eliminating any issue of “dishonesty” and focused on knowledge instead.

Apart from Lord Justice-Clerk Thomson’s remarkably short dictum containing the heralded football metaphor, the case itself was hardly revolutionary. Even if the doctrine would have been uneasy alongside the established Scottish approach of “race to register” for real rights, the policy justifications of preventing fraud and penalising bad faith are evident. Scots law has always had this exception, as confirmed by the case. According to Lord M’Donald in *Trade Development Bank v Warriner & Mason (Scotland) Ltd*, it was founded on equity and might be viewed as a development of the doctrine of personal bar.<sup>22</sup> This is probably the most straightforward example of the application of the offside goals rule.

On the other hand, if the same scenario happens under English law, the analysis will be very different. It is far from straightforward despite the same end result.

Unlike the “unititular” system of Scots law where there is only one title at any time, English law recognises the fragmentation of title into legal title and equitable title in the same property. Equity looks on that as done what ought to have been done. As soon as a contract for the sale of land is concluded, provided that it can be enforced through specific performance, equity will see the transfer of the land as complete. The legal title

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<sup>20</sup> 1950 SC 483.

<sup>21</sup> *Marshall v Hynd* (1828) 6 S 384; *Petrie v Forsyth* (1874) 2 R 214; *Stodart v Dalzell* (1876) 4 R 236.

<sup>22</sup> 1980 SC 74, 82.

will of course have to transfer according to its own formality requirements.<sup>23</sup> But the equitable title is acquired by the purchaser as soon as the contract for sale is concluded. Therefore in a *Rodger Builders* scenario, the second purchaser would not have acquired the equitable title, as it is now held by the first purchaser.

The exception under English law to this conclusion, without taking into account any statutory reform since 1925, is the doctrine of notice. A bona fide purchaser of a legal estate for value without notice, also known as Equity's Darling, can take the legal estate free of any prior equitable title or interest. The second purchaser in *Rodger Builders* was of course not bona fide as he had actual knowledge of the prior contract. He would therefore be bound by the first purchaser's equitable title. He may still acquire the legal title if he makes to the register first, but effectively he will be holding the property on a constructive trust for the first purchaser. The end result may appear similar to that under Scots law, the first purchaser can ask for the legal title from the second purchaser before it has the chance to be passed on to any other bona fide third party.

It is immediately obvious that the two systems approach the same problem from opposite ends theoretically. In Scotland, the second purchaser would prevail but for the exception penalising his bad faith. In England, the first purchaser would prevail but for the second purchaser being bona fide. Though the results match each other, the English approach seems more complicated than the straightforward, sole exception under Scots law. If only problems in the real world could have remained as simple as *Rodger Builders*, it would be nonsensical to suggest that Scots law can draw any help from English law in this regard.

## The decisive point in time: *Alex Brewster*

The traditional Scottish approach will run into problem, however, in cases such as *Alex Brewster & Son v Caughey*.<sup>24</sup> If the offside goals rule is truly only an exception to the general rule that real rights shall prevail, then certainly the exception should not be engaged where the party's conduct is unimpeachable.

In *Alex Brewster*, another case of a double sale, the point of law was whether any knowledge obtained by the second purchaser after acquiring the personal right and before acquiring the legal right is nevertheless sufficient to engage the offside goals rule. Lord Eassie answered the question in the affirmative. Overshadowed by many allegations and suspicion of fraudulent dealings, the best case that the second purchaser could argue was that he only became aware of the prior contractual right after he acquired his own personal right but before he could acquire the real right. The story was not believed in court and the judge found bad faith throughout the transactions in this case.<sup>25</sup> But what was more important was to be found in the *obiter*, where Lord Eassie seemed to indicate that the second purchaser must not have such knowledge throughout the transaction until after he has secured the real right.<sup>26</sup>

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<sup>23</sup> Under the Law of Property Act 1925 s 52, by deed which complies with the Law of Property (Miscellaneous) Provisions Act 1989 s 1. For registered land it must also comply with the registration requirements imposed by Land Registration Act 2002 s 27.

<sup>24</sup> Unreported, full judgement available <http://www.scotcourts.gov.uk/opinions/EAS0904.html>.

<sup>25</sup> *Ibid*, [74].

<sup>26</sup> *Ibid*, [73].

The decision, or more precisely the *obiter*, is highly controversial and hardly justifiable in the light of the policy concerns supposedly governing the offside goals rule. There is unequivocal criticism amongst commentators, and hardly any announced support for it.<sup>27</sup> Professor Rennie envisaged the legal and financial dilemma facing a property developer in good faith, who had suddenly learnt of a prior personal right after contract but before registration, who had also already committed considerable amount of resources in contracts with architects, builders and others.<sup>28</sup> As a matter of principle, it is difficult to see why Scots law should punish such a person who contracted in good faith and only became vulnerable later on due to circumstances out of his control.

However, this is exactly the position of English law, due to its different starting position as explained above. Once an equitable interest is created in favour of the first purchaser, it is up to the second party to prove he satisfy all the test of an Equity's darling, in other words a bona fide purchaser for value of a legal estate without notice, before he can take free of a prior equitable interest. Anything short in the formula, then a prior interest prevails over a later interest without the need for justification. When questioning the merit of *Alex Brewster*, Anderson concluded that even English law would not protect the first party's equitable interest here.<sup>29</sup> This is wrong. The second purchaser can only defeat a prior equitable interest if he remains in good faith until he has acquired the legal estate.<sup>30</sup> Any knowledge of a prior conflicting interest obtained, however innocently or fortuitously, after contract but before the legal estate is acquired will make the prior interest binding against the second party.

It appears that no one has contended that English law is unfair in this regard in the last two hundred years,<sup>31</sup> or that such a position would be "commercially unrealistic".<sup>32</sup> The criticisms against *Alex Brewster* from a Scottish perspective may be justifiable. Yet the only Scottish case on this issue, albeit only in *obiter*, eerily reflects the position of English law.

## Exception to the exception: creditors

In *Burnett's Trustee v Grainger*, Lord Rodger pointed out that the difference between a purchaser and a trustee in sequestration, representing the creditors of the bankrupt, "lies at the heart of this case", to the extent that the offside goals rule cannot be used

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<sup>27</sup> Gretton and Steven (n 3), [4.46] fn 79; RG Anderson and J MacLeod, 'Offside goals and interfering with play' (2009) SLT 93, 95; R Rennie, 'Marching towards equity – blindfolded' (2009) SLT 187, 187-188.

<sup>28</sup> R Rennie, 'Marching towards equity – blindfolded' (2009) SLT 187, 190.

<sup>29</sup> RG Anderson, "'Offside Goals" before *Rodger Builders*' (2005) Jur Rev 277, 289.

<sup>30</sup> K Gray and SF G, *Elements of Land Law* (5<sup>th</sup> edn, OUP, Oxford 2008) [8.3.21] fn 1: "Even a purchaser who has paid the purchase money in full is not safe if notice of the adverse equitable interest reaches him before he takes a formal conveyance of the legal estate."; C Harpum, S Bridge and M Dixon, *Megarry & Wade The Law of Real Property* (8<sup>th</sup> edn, Sweet & Maxwell, London 2012), [8-010]: "The purchaser must have the legal estate properly vested in him (by a conveyance) before he will be safe. If he has paid the purchase-money, but then gets notice of a prior equitable interest before the purchase is completed by the conveyance of the legal estate, he will take subject to the equity." (Footnotes omitted from quote.)

<sup>31</sup> The leading case often cited in this regard is *Wigg v Wigg* (1739) 1 Atk 382.

<sup>32</sup> RG Anderson and J MacLeod, "Offside goals and interfering with play" (2009) SLT 93, 95.

against creditors.<sup>33</sup> The authority and reasons for such a position form part of the ratio of the case and would not be discussed further here. The law is clear. The offside goals rule does not extend to creditors.

Yet again this is an interesting position compared to the English doctrine of notice. It does not apply to a trustee in bankruptcy representing creditors. The reason is simple. Such a person is not a “purchaser” in English property law. The word “purchaser” here includes many classes of persons not otherwise associated with the word in non-legal context. Any person who acquires right by the act of parties is a purchaser, such as a buyer, a lessee or a mortgagee. However, a person who acquires right by operation of the law is not a purchaser. Therefore, a trustee in bankruptcy is not a purchaser and is unquestionably out of the scope of the equitable doctrine of notice, which only applies to purchasers.

It is now unnecessary to contemplate whether the offside goals rule should be extended to creditors. Following *Burnett’s Trustee* and the perceived injustice in the case, statutory reform has practically ensured that trustees in sequestration cannot take advantages of the fact that they are not bound by the offside goals rule.<sup>34</sup> In the light of this reform, however, it does seem viable to argue that the rule should have been applicable in this context in the first place for cases such as *Burnett’s Trustee*, to prevent the injustice of the trustee in sequestration retaining both the house already sold and the purchase price received for it. Any such thought walks dangerously close to Lord Jauncey’s line in *Sharp v Thomson* regarding the lack of “beneficial interest” in the property for which price was received and conveyance delivered.<sup>35</sup> On the other hand, the fact that Scots law categorically refused to apply the offside goals rule to creditors in bankruptcy situations again corresponds well with English law’s position of excluding the involvement of the doctrine of notice in this context.

## Nature of protected rights: *Wallace and Gibson*

Knowing the class of persons that the offside goals rule will not apply to is of course not enough. To have any sense of certainty, there must be clear boundaries as to how far this exception will extend to in other cases.

In *Wallace v. Simmers*<sup>36</sup>, a son bought a farm from his father, subject to the right of occupancy by his parents and sister for as long as they desired. After the parents passed away, the son sold the farm that his sister was still occupying. The purchaser was specifically informed of the occupancy right of the sister. However, as soon as he bought the farm, the new owner sought to eject the sister. On appeal, the Inner House upheld the sheriff court’s decision, that the occupant was to be ejected.

In the leading judgement, Lord President Clyde prescribed an important criterion for the application of the offside goals rule.

*From the decisions, it is clear that the exception only operates where the right asserted against the later purchaser is capable of being made into a*

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<sup>33</sup> [2004] UKHL 8, [67].

<sup>34</sup> Bankruptcy and Diligence (Scotland) Act 2007, s.17.

<sup>35</sup> *Sharp v Thomson* 1997 SC (HL) 66, 71-72.

<sup>36</sup> 1960 SC 255.

*real right. If it is nothing but a mere personal obligation not capable of being so converted, then the ultimate purchaser is not in any way bound or affected by it.*<sup>37</sup>

The occupant in this case had a right to occupy the property for as long as she desired, which was not capable of being converted into a real right. She therefore had no enforceable right against a purchaser, whether that purchaser is in good faith or not.

This key test of whether a right is “capable of being made real” is clearly necessary to limit the scope of the offside goals rule. On the other hand, it is unsatisfactory because it is unclear. It may be indisputable that the right to acquire title under a binding contract of sale is capable of being made real. But it is logically difficult to distinguish such a right from that in *Campbell’s Trustees v Corporation of Glasgow*.<sup>38</sup> In the latter case, a right to have certain land conveyed at a future date, acquired in return for consideration of a monetary payment, was held to be personal and not binding on purchaser despite it being recorded on the Register of Sasines.

More troublesome than inconsistency with old case law is the potential of such a loosely defined test to cause havoc in the current law by admitting too many rights on to the list of those capable of being made real. *Gibson v Royal Bank of Scotland*<sup>39</sup> is another recent example, where an exercised option to purchase was protected by the offside goals rule. Lord Emslie’s ratio for the decision is disappointing for anyone expecting more certainty in this area. On the one hand his Lordship would not go as far as allowing *mala fide* knowledge alone to be sufficient grounds of challenging an otherwise valid real right.<sup>40</sup> On the other hand, the judge was of the view that *Wallace* did not intend to lay down any rigid universal requirement, such as the “capable of being made real” test, because it was not necessary to do so in that case.<sup>41</sup> Consequently, according to Lord Emslie, this test which Scots law used in the past fifty years was nothing more than “a means of expressing the court’s refusal” to protect the right in question. The ideal situation from the court’s perspective may be to apply the bad faith exception “in a wide range of different circumstances”, with no clear boundary of what may or may not be covered.

*Gibson* gave rise to a large number of unanswered questions. Professor Rennie wondered whether an unexercised option to purchase, an unasserted right of pre-emption, or even a prohibition of alienation of any right may now be protectable by the offside goals rule. He concluded that “[i]f that is the law then we are in uncharted waters and property rights are considerably less certain”.<sup>42</sup> If one of the most experienced conveyancers and distinguished property law professors in Scotland cannot not tell where the law is going next, the situation is undoubtedly worrying.

Yet this situation would make perfect sense in the eyes of English property lawyer. There are rights which will never affect property, known as personal rights. There are rights which are dependent on onerous formality and publicity and often registration in the case of land during creation or transfer. But once acquired, these rights are “good against the world”, universally enforceable. These are known as legal proprietary rights.

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<sup>37</sup> 1960 SC 255, 259.

<sup>38</sup> (1902) 4 F 752; AJ McDonald, *Conveyancing Manual* (6<sup>th</sup> edn T&T Clark, Edinburgh 1997) [33.61].

<sup>39</sup> [2009] CSOH 14.

<sup>40</sup> [2009] CSOH 14, [49].

<sup>41</sup> [2009] CSOH 14, [45].

<sup>42</sup> R Rennie, ‘Marching towards equity – blindfolded’ (2009) SLT 187, 189.



Then there are rights in between the two camps. These rights often failed to satisfy the formality or other requirements of legal rights, yet they are capable of binding the property unlike personal rights if there is any reason for the court to intervene, most noticeably on the grounds of preventing “unconscionability”. These are, of course, equitable proprietary rights.

English law spent centuries mapping the boundaries between legal and equitable rights. A deed of conveyance transfers the legal title to land. Failing short of this, with only a concluded contract,<sup>43</sup> or in the case of land registration, delivered but unregistered deed of conveyance,<sup>44</sup> there is an equitable title. A charge by way of a legal mortgage, the equivalent of a standard security in Scotland, can only be created by a duly registered deed. If there is no deed or if the deed is not duly registered, this becomes an equitable charge.<sup>45</sup> Whenever something goes wrong with legal rights or a transfer at law, equity will take over. The ensuing equitable right will be more vulnerable if compared to the full legal right, but it is often enforceable against third parties, especially if the third party is *mala fide* in the eyes of Equity. This mentality lies at the heart of English property law.

But such a halfway house does not exist in Scots law. Lord Hope’s acclaimed dictum in the Inner House during the *Sharp v Thomson*<sup>46</sup> saga has eliminated any possible hiding place for intermediate rights, neither real nor personal, in Scots property law. As observed by his Lordship when *Burnett’s Trustee v Grainger* reached the House of Lords before his lordship, the counsels did not even attempt to argue that there could be some kind of intermediate rights of property.<sup>47</sup> Scottish Law Commission stated the obvious for Scots law: “[t]here are no equitable proprietary interests.”<sup>48</sup>

Yet rights protected by the offside goals rule are developing into such a class. They are more than personal rights, because personal rights would never be protected in this context, as seen in *Wallace v Simmers* despite the undoubted bad faith of the purchaser. They are less than real rights, because the holder of real rights can deal with the property without having to go to the court to challenge anyone else. But they are also capable of defeating real rights with the appropriate circumstances and timing, most importantly the bad faith of the holder of real rights and before the property is transferred again to a bona fide third party. If *Wallace* and *Gibson* are to be relied upon as the authority here, it seems futilely academic to argue that this third class of rights does not exist in Scots law.

In fact, the instinctive and habitual denial of the existence of such a class of rights is possibly an important part of the difficulties in the current law. The essence of the approach in *Gibson* is that the court will not spell out clearly the boundary of this class. This would be completely understandable from the perspective that if the boundaries are set then this class must exist. On the other hand, not setting the boundary will not prevent this class gathering its mass through case law. We already know, thanks to *Gibson*, that an exercised option to purchase falls within this class. The quest for

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<sup>43</sup> Gray and Gray (n 30), [8.1.47].

<sup>44</sup> Gray and Gray (n 30), [3.1.23].

<sup>45</sup> Gray and Gray (n 30), [6.1.23]-[6.1.24].

<sup>46</sup> 1995 SC 455. The Inner House decision was overturned, controversially, by the House of Lords as a matter of statutory interpretation of floating charge legislation.

<sup>47</sup> [2004] UKHL 8, [50].

<sup>48</sup> SLC, *Report on Land Registration*, [20.14].

certainty in law is made much more difficult by avoiding the drawing of a line between personal rights and rights protectable by offside goals, as well as between rights protectable by offside goals and valid real rights.

## *Gibson and beyond*

English law started drawing such boundaries centuries ago, dividing all rights, so far as property law is concerned, into personal rights, equitable rights and legal rights. In this regard, Scots law is indeed venturing into uncharted waters, bearing in mind the worry that such an adventure may challenge the foundations of the established Scots system of property law, which has no place for “equitable rights”.

Meanwhile, the position of Scots law in this context so far corresponds well with the English understanding of equitable rights. Concluded binding contracts are the most comfortable examples in both jurisdictions. Delivered but unregistered deed of conveyance, and granted but unregistered right of security all seem to fall into the same bracket.

An option to purchase warrants more discussion. In English law, the exact nature of an option to purchase is said to be an “academic riddle”.<sup>49</sup> However, it is clear that once an option is granted, even before it is exercised, it creates an equitable proprietary interest in the property.<sup>50</sup> In Scotland before *Gibson*, there seems to be indication of doubts as to whether an option is protectable by the offside goals rule.<sup>51</sup> However, Scottish Law Commission in its 2000 report on real burdens had little hesitation in seeing options as protectable by the offside goals rule.<sup>52</sup> It is therefore hardly surprising that the Lord Ordinary came to the decision in *Gibson*.

Similar to but different from an option to purchase is the right of pre-emption. In English law, the nature of such right was debatable for many years. The reasonably settled view now is that it is strictly speaking not a proprietary interest.<sup>53</sup> Nevertheless, its effect is often made proprietary through various statutory provisions. For unregistered land, such a right can be entered as an estate contract on the Register of Land Charges.<sup>54</sup> For registered land, such a right is capable of binding successors in title.<sup>55</sup> In other words, although such a right is perhaps not proprietary, through the means of registration it can obtain the most important characteristics of a proprietary right in binding successors in title. The doctrine of notice practically has no role to play in this context as the interest is either clearly recorded on a public register and valid, or it is personal and not enforceable. Being aware of a prior unrecorded right is unlikely to do any harm.

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<sup>49</sup> Gray and Gray (n 30), [8.1.73].

<sup>50</sup> Gray and Gray (n 30), [8.1.77]; EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (18<sup>th</sup> edn, OUP, 2011 Oxford), 983-4;

<sup>51</sup> RG Anderson and J MacLeod, ‘Offside goals and interfering with play’ (2009) SLT 93, 95-96; R Rennie, ‘Marching towards equity – blindfolded’ (2009) SLT 187, 188.

<sup>52</sup> Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, October 2000) [10.8].

<sup>53</sup> Burn and Cartwright (n 50), 986; Harpum, Bridge and Dixon (n 30), [15-065]; Gray and Gray (n 30), [8.1.81].

<sup>54</sup> Land Charges Act 1972 s 2(4).

<sup>55</sup> Land Registration Act 2002 s 115.

In Scotland, the situation may again be comparable. There are two different types of right of pre-emption. The “personal” right of pre-emption is a personal contract between X, the owner of the property, and Y, the holder of the right. However, if Y owns land which can potentially be benefitted from this right, such a right of pre-emption is then capable of being created as a real burden.<sup>56</sup> A real burden is only validly created by registration against both the burdened property and the benefitted property after 28 November 2004.<sup>57</sup> Similar to English law, the right here is either fully present on a public register, or completely personal with no chance of being a real right. The unanswered question here is of course whether this will be the court’s position when any party presents an argument of unregistered right of pre-emption based on the offside goals rule. Professor Rennie did not seem to have any assertive answer when pondering this possibility and questioned the value in distinguishing between “personal” and “real burden” rights pre-emption if the offside goals rule could apply to the former.<sup>58</sup>

Continue down the route of real burdens, there has been no discussion regarding the offside goals rule as to whether a purchaser will be bound by granted but unregistered real burdens (of any kind other than a right of pre-emption) if he had knowledge of them prior to registering his title. It is very unlikely he will be so bound, because the consequences of such an approach would appear preposterous. Real burdens, which since their emergence in the 19<sup>th</sup> century have only ever existed in recorded or registered deeds, would potentially be able to float around without any publicity. All that is required to make a burden real and enforceable against a successor in title is to send a photocopy of the unregistered grant two days before the purchaser completes registration.

That being said, it is as, a matter of principle, difficult to argue as to why the offside goals rule should not apply to real burdens, if the reasoning in *Wallace* and *Gibson* are to be followed. Is it not true that an unregistered burden is “capable of being made real” through the simple step of registration? Is it not the case that if a purchaser becomes aware of this prior right inconsistent with his grant of a burden-free title he would be *mala fide* in the eyes of the law?

If it is of any comfort, the English counterpart to real burdens in the form of restrictive covenants could not have been enforced against a purchaser without registration. In unregistered land, covenants must be entered as land charges.<sup>59</sup> In registered land, they must be protected by notices on the registered title. It would indeed be unthinkable in the context of real burdens if Scots law would forego its stringent requirements on formality and becomes considerably more flexible and tolerant towards flawed real rights than English law. But again, that is exactly the approach of English regarding restrictive covenants.

## Turning away from the doctrine of notice

In view of all the similarities between Scots and English law in this context discussed above, it seems reasonable to argue that somehow this still developing concept of the

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<sup>56</sup> GL Gretton & KGC Reid, *Conveyancing* (4<sup>th</sup> edn, W.Green, 2011), [13-30].

<sup>57</sup> Title Conditions (Scotland) Act 2003 s 4.

<sup>58</sup> R Rennie, ‘Marching towards equity – blindfolded’ (2009) SLT 187, 190-191.

<sup>59</sup> Unless they were created before 1 January 1926.

offside goals rule is creating a body of law strikingly similar to the English doctrine of notice. Such similarity is surprising, given the fundamental differences between the two systems of property law. More importantly, such an “equitable exception” is inevitably unworkable and dangerous for the established and principled institutions of Scots property law.

It took English law many centuries to understand the class of rights known as equitable rights in property law. Even then there are uncertainties regarding things such as right of pre-emption, discussed above. Scots law, particularly after *Gibson*, potentially needs to accomplish a similar task of creating a list of rights protectable by the offside goals rule in a matter of decades if not years. More importantly, formalising this list would be a fundamental contradiction to the rigid division between real and personal rights in Scots law, because rights on this list will be more than personal but less than real. But not providing a list on the other hand would put the law in an unacceptable state of uncertainty, with purchasers and their advisors always left unsure as to whether some rumoured personal rights would defeat their real rights. There is no happy ending on the horizon either way.

Furthermore English law also had much more experience dealing with the concept of notices, actual, constructive or imputed, over many years of trials and errors. The conveyancing practice has also been developed surrounding this concern, to effectively and efficiently avoid surprises and unwanted knowledge. The same cannot be said for Scots law which traditionally does not need to go this far. The so called “duty of inquiry” possibly seen as a defence against claim based on offside goals rule surfaced after *Rodger Builders* is hardly developed at all. As pointed out by Anderson and MacLeod, the concept is so vaguely formulated as to be unworkable.<sup>60</sup> There are many questions and no answer to them from the judiciary, the profession or the academia.

Even in English property law, where such a doctrine based on conscience and fairness was at the heart for a long time, the quest for enquiring into parties’ actual and constructive mindset is seen as giving rise to uncertain and unpredicted results. The modern statutory framework introduced since 1925 has severely marginalised the role of this famous doctrine. In registered land, it does not apply at all. In unregistered land, it applies to a very small number of residual equitable interests not dealt with by the system of land charge registration.

To put this policy shift into perspective, it may be helpful to use the facts of *Gibson v Royal Bank of Scotland*. If the case concerned unregistered land in England, the Gibsons needed to register their option to purchase as a land charge in order to enforce it against a purchaser, including the bank with a mortgage in the case. Without a land charge, however much knowledge the bank had and however unconscionable it may be for them to deny the Gibsons, the option to purchase is void.<sup>61</sup> If the case concerned registered land in England, the Gibsons’ unregistered option to purchase would almost certainly be enforceable against the bank, similar to the Lord Ordinary’s decision in the Court of Session. However, the English case would have little to do with notice, knowledge, conscionability, or any “equitable exception”. It would be down to the fact that the Gibsons were in actual occupation of the registered property. All their proprietary interests are binding against future registered dispositions.<sup>62</sup> With the facts

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<sup>60</sup> RG Anderson and J MacLeod, “Offside goals and interfering with play” (2009) SLT 93, 97.

<sup>61</sup> *Midland Bank v Green (No 1)* [1981] AC 513.

<sup>62</sup> Land Registration Act 2002 Sch 3 para 2.

of *Gibson*, whether the land is registered or unregistered, the outcome under English law is certain. Any undergraduate law student can be expected to provide it in the land law exam.

It is quite astonishing that such certainty is absent from Scots law in cases such as *Gibson*. For Scots law, which started a compulsory property register more than three hundred years before England, which places so much emphasis on recording of formal documents affecting land, any comparison with English law, largely in its pre-1925 condition, is both disappointing and alarming. Practitioners, academics and legislators in England have decided more than eighty years ago that the age-old doctrine of notice could no longer meet the demand of modern society and conveyancing practice. They spent the best part of 20<sup>th</sup> century marginalising the doctrine and curtailing its scope of application. On the other hand, in the light of cases such as *Alex Brewster* and *Gibson*, it seems that Scots law may well develop a similar concept even further in the 21<sup>st</sup> century. The Scottish Law Commission sounded rather unconcerned by the reputation of the doctrine of notice in Commonwealth jurisdictions, largely based on the view that Scots law is different.<sup>63</sup>

Still it is encouraging that the Scottish Law Commission and many prominent figures of Scots law are considering and supporting the abolition of the offside goals rule.<sup>64</sup> It is indeed “a bad rule”.<sup>65</sup> Whatever its true origin, the current body of law developed by the court in the last sixty years or so is worryingly similar to the English concept of the doctrine of notice. Such an “equitable exception” that is not “rigidly confined” has no safe place to operate in Scots property law without coming into collision with other founding principles. More importantly, conveyancing practice in the modern world has no place for the perennial deliberation over parties’ conscience or knowledge. Even the English have abandoned such attempts of Equity the best they could many decades ago in the context of land law.

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<sup>63</sup> Scottish Law Commission, *Report on Land Registration* (Scot Law Com No 222, February 2010), [20.13]-[20.14], [23.9].

<sup>64</sup> *Ibid*, [14.61]-[14.65].

<sup>65</sup> *Ibid*, [14.61].